No. 13-883

United States
COURT OF APPEALS
for the Ninth Circuit

LESLIE H. CHAPPELL,
Appellant,

vs.

C. D. JOHNSON LUMBER COMPANY,
Appellee.

PETITION FOR REHEARING

Appeal from the United States District Court for the District of Oregon.

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Appeal from the United States District Court for the District of Oregon.

Pursuant to Rule 23 of the Rules of the United States Court of Appeals for the Ninth Circuit, effective May 27, 1953, appellant respectfully petitions for a rehearing. The rehearing requested concerns that portion of the opinion dated November 22, 1954, which holds that the injury to appellant falls exclusively within the federal jurisdiction, and that his remedy is likewise exclusively within the federal jurisdiction.

I.

The Mere Fact That Appellant's Injury Occurred on Navigable Waters Does Not Limit Appellant's Remedy to One Provided by Federal Law.

Volume 33, U.S.C.A., Sec. 903, specifically limits the Longshoremen's and Harbor Workers' Compensation Act to situations wherein state workmen's compensation proceedings may not be provided by state law. Since 1942 only three cases involving the application of state workmen's compensation proceedings to injuries upon navigable waters have been considered by the Supreme Court of the United States. These three cases are:

Davis v. Department of Labor & Industries, 317 U.S. 249, 63 S. Ct. 225, 87 L. Ed. 246;

Moores Case, 323 Mass. 162, 80 N.E. 2d 478, (Bethlehem Steel Company v. Moores, 335 U.S. 874, 93 L. Ed. 417, 69 S. Ct. 239), and

Baskin v. Industrial Accident Comm., et al., 89 Cal. App. 2d 632, 201 P. 2d 549, 338 U.S. 584, 94 L. Ed. 523, 70 S. Ct. 99, 97 Cal. App. 257, 217 P. 2d 733, 340 U.S. 886, 71 S. Ct. 208, 95 L. Ed. 643.

There have been no cases since 1942 which have held the Longshoremen's and Harbor Workers' Compensation Act was the *exclusive* remedy for an injury received on navigable waters when the injured party was seeking his remedy through workmen's compensation proceedings supplied by the individual state.

II.

There Is a Genuine Issue Between Appellant and Appellee of a Material Fact.

Rule 56 (c) of the Federal Rules of Civil Procedure provide that a summary judgment can be granted only if the pleadings, depositions, admissions on file and affidavits show that no genuine issue as to any material fact exists. It has long been held by the Supreme Court of the United States that the employee of a sawmill who was working *exclusively* on navigable waters has only an incidental relation to navigation and commerce.

> Sultan Railway & Timber Co. v. Department of Labor & Industries of Washington and Eclipse Mill Company v. Department of Labor & Industries of Washington, 277 U.S. 137, 48 S. Ct. 505, 72 L. Ed. 820.

Appellant in the case at bar was an employee of a sawmill and receiving the same pay as the laborers who worked in other portions of appellee's sawmill (R. p. 17). He sometimes worked exclusively on shore, and even in the performance of his duties as a spotter, his job was as much on shore as it was on the particular barge where he placed a set of blocks.

Before it can be stated as a matter of law that appellant's activities were strictly maritime within the meaning of the Longshoremen's and Harbor Workers' Compensation Act, there are innumerable factors which could only appear by evidence adduced at the trial. For instance, it might become important to discover what

happens to the lumber on the barges after these barges are loaded on the mill premises. Are they merely taken to another portion of appellee's mill for further processing; are they left standing for any length of time in another portion of appellee's premises; are they reloaded onto a regular ship or larger vessel at appellee's premises or at some other place? It further becomes important to consider appellant's work and the amount of time that he spends actually on the barge, as compared to the time spent on other parts of the appellee's premises. Mere presence on a barge on navigable waters does not limit appellant to a federal remedy. If this were so, the *Davis* case, supra, would have had the opposite result, for in that case the deceased was actually on a barge on navigable waters and was loading the barge himself. In the case at bar, although appellant was on the barge at the time of the injury, he himself was not doing the actual loading.

To hold that a sawmill employee, a portion of whose work takes him temporarily aboard a barge for the purpose of laying two wooden blocks, is engaged in a maritime activity exclusively is contrary to every judicial decision since 1942. In fact, such a holding completely eliminates the so-called twilight zone theory and adopts a wholly new theory that any employee who at the time of his injury is aboard a barge in excess of 18 tons on navigable waters must seek his remedy only under the federal law.

III.

The Cases Relied Upon by This Court Do NOT Hold That the Plaintiff Is Limited to His Rights Under the Longshoremen's and Harbor Workers' Act, as Compared to Proceedings Under a State Compensation Act.

Pennsylvania RR Company v. O'Rourke, 344 U.S. 334, 97 L. Ed. 367, 73 S. Ct. 302, was not a decision as between the Longshoremen's & Harbor Workers' Compensation Act and a state workmen's compensation proceeding. Instead, it was strictly between two federal acts; the Longshore Act and the Federal Employers' Liability Act. At 97 L. Ed. 374, the court makes two statements that specifically will eliminate this case as an authority for the question at hand.

(1) The so-called "duties test" is not applicable when the two federal acts are compared. In other words, a janitor or any other service man or construction worker who was injured on navigable waters must seek his remedy under the Longshoremen's Act as opposed to the Federal Employers' Liability Act. Such a limited standard is not true when the choice is between the Longshoremen's Act and a state workmen's compensation act, as we have seen, in the *Davis, Baskin* and *Moores* cases, supra.

(2) The court specifically recognized that uncertainty existed in areas where state and federal statutes

might overlap. No such uncertainty existed or exists between the two federal statutes involved in the *O'Rourke* case.

Western Boat Building Company v. O'Leary, 198 F. 2d 409, certainly is not authority for the proposition that plaintiff as a matter of law, and without the right of introducing evidence on his behalf, is limited to his federal remedy. In fact, that case is authority that an injured party in a situation similar to appellant's may seek his remedy either within the federal field or by state workmen's compensation proceedings. The plaintiff in that case had actually applied to the Compensation Commission for the State of Washington and had received compensation. The only question at issue was could he now apply to the Longshoremen's and Harbor Workers' Compensation fund and receive payment from them also. The court rightfully applied the twilight zone theory and said that it did have such an election.

Conclusion

The petition for rehearing should be granted so that this court may hear arguments and consider only the one issue of whether as a matter of law appellant is limited in his remedy to that provided by the Longshoremen's Act. We firmly believe that upon reconsideration of this question this court will remand the case to the District Court for a full and fair hearing and trial. One of the elements of this trial would necessarily be the activities of the appellant and the overall activities of the appellee to determine whether or not

appellant was within the so-called twilight zone at the time of the injury.

Respectfully submitted,

GREEN, RICHARDSON, GREEN & GRISWOLD,
BURL L. GREEN,

Attorneys for Appellant.

I, BURL L. GREEN, one of the attorneys for appellant petitioner, do hereby certify that in my opinion this petition is well founded in law and fact and that it is not interposed for delay.

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Of Attorneys for Appellant.